United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,441

209

ROBERT M. JOHNSON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 14 1968

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(Appointed by this Court)

QUESTION PRESENTED

Was the trial judge's charge to the jury prejudicial, misleading, and confusing so as to effect Appellant's substantial rights within the meaning of the "plain error" provision of Rule 52(b) Fed. R. Crim. P.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,441

ROBERT M. JOHNSON,

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APPEAL FROM THE UNITED STATES
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia in which Appellant was tried for and convicted of unauthorized use of an automobile (22 D.C. 2204).

This Court has jurisdiction under the Act of June 25, 1948, Ch. 646, Sec. 1; 62 Stat. 929; 28 U.S.C. Sec. 1291.

Statement Of The Case

On October 6, 1967, Appellant was adjudged guilty of the offense of unauthorized use of a vehicle (22 D.C.C. 2204), and was sentenced to imprisonment for a period of twenty months to five years.

At the trial the complaining witness, Nelson E. Harper, testified that he visited Willie Mae Monroe at her residence on May 25, 1966 at about 6:00 p.m. He stated he parked his car near Mrs. Monroe's residence. He further testified that he assisted Mrs. Monroe with some chores and that she "...went to the store and she bought a half pint of Gordon's gin." According to Harper, he was alone with Mrs. Monroe and she poured him a drink "...in a little jelly glass..." He testified that after taking the drink he remembered nothing until 4 a.m. the next morning when he awoke to find himself with two other men lying drunk on the floor at Mrs. Monroe's residence. He testified Mrs. Monroe was gone, as were the keys to his car, his wallet, and money. According to Harper, his car was gone also. (Tr. 10-15)

Harper's version of what transpired was challenged by Mrs. Monroe who appeared as a witness for Appellant. Mrs. Monroe, who testified she had known Harper for about two years, confirmed that Harper visited her at her residence on May 25, and she stated he came about 5 p.m., at which time he helped her with some chores. During this visit Harper bought some beer and gin and then he left

about 6 p.m. according to Mrs. Monroe. Later that evening she testified Harper returned about 8 p.m. with a friend and the three of them had some drinks. Also present were three other people. According to Mrs. Monroe, Harper's friend asked Harper to drive him home, but Harper declined, stating he "...wasn't up to any driving." The record is not clear as to when Appellant arrived at Mrs. Monroe's home, but at any rate, Mrs. Monroe testified Appellant was present when Harper's friend asked to be driven home. Inasmuch as Harper did not feel up to driving, Mrs. Monroe testified, Harper gave Appellant his keys and what she testified was a wallet "...and [Harper] told Mr. Johnson and this other fellow that if they come into complications that would take care of everything". Finally, she testified, Harper asked Appellant to drive his friend home and return Harper's car.

Mrs. Monroe testified she believed Harper's reason for giving Appellant his keys was that Harper wanted to be alone with her, and when they were alone Harper stated "...if I would be his girlfriend he would help me and my kids to live better and do different things for us". Later that evening her mother arrived, and inasmuch as there was not enough liquor remaining, Harper left to purchase some more. When he returned shortly afterwards, she testified Harper told her he had been robbed of his keys and wallet. She stated she told Harper that his keys and wallet could not have been just taken inasmuch as he had handed them to Appellant. Finally, Mrs. Monroe testified Harper left at her request about 1 a.m.. Her reason for

requesting him to leave was that he had been "...pawing over me".

Mrs. Monroe testified that Harper returned to her home about 8 a.m. on May 26, but she said she was leaving and didn't want him in her home any more. She said that about a week later Harper visited her and "...told me that if I wouldn't testify or anything he could make it much easier for me and my children". Harper denied making this statement to Mrs. Monroe. (Tr. 37, 42-49).

Harper testified that on May 26 at about 3:45 p.m. he saw his car being driven on 9th Street, N.W., by the Appellant and two other men, and he reported this to the police. (Tr. 16-19) Detective Peter Monaco of the District of Columbia Police Department testified that on May 26 about 3:45 p.m. the police radio dispatcher broadcast a lookout for a car that turned out to be Harper's. He testified that shortly afterwards he saw and then tried to flag down the vehicle but it pulled away and finally got caught nearby in the rush hour traffic. Monaco said the three occupants, one of whom was Appellant, attempted to flee, but Appellant was apprehended, and had upon his person Harper's wallet and personal papers. (Tr. 3-7) Mickey Richardson, who was with Harper on the afternoon of May 26, corroborated Harper's testimony regarding seeing Harper's car and apprehending Appellant. (Tr. 38-42)

Based upon this evidence and the trial judge's charge, the jury returned a verdict of guilty against Appellant.

Statement Of Points

1. The trial judge erred in failing to instruct the jury that to find Appellant guilty of the crime of unauthorized use of a vehicle, it was first required to find that the Appellant did not have the consent of the owner of the vehicle Appellant was alleged to have used; and that only if the jury made this finding should it then determine if the vehicle was used by Appellant.

2. The trial judge erred in failing to instruct the jury that it should not consider evidence regarding flight by the Appellant if the jury did not believe that Appellant used the complaining witness' vehicle without consent.

3. The trial judge erred in his instruction to the jury regarding the significance of flight by the Appellant.

4. The trial judge's instruetion to the jury was confusing regarding what he stated was "...the key issue in the case..." (Tr. 80)

Summary Of Argument

The trial judge's charge to the jury contained sufficient errors so as to affect Appellant's substantial rights within the meaning of the "plain error" provision of Rule 52(b) Fed. R. Crim. P.

1. Initially, the trial judge failed to instruct the jury that to find the Appellant guilty of unauthorized use of a vehicle, a two

step process was involved. Thus, the trial judge should have, and did not, explain to the jury that first it must decide whether it believed the complaining witness Harper's testimony that he did not consent to the Appellant's use of his car, as opposed to the testimony of Mrs. Monroe, an eye witness, that Harper gave his consent to the Appellant. The trial judge, should have, and did not, explain to the jury that only if it resolved this question against the Appellant should it consider whether the Appellant used the vehicle owned by Harper. The failure to delineate this two step process constituted "plain error" within the meaning of Rule 52(b) Fed. R. Crim. P.

The vice of the instruction to the jury was aggravated by the trial judge's instruction regarding flight. For he failed to explain to the jury that they should not consider Appellant's flight if the jury did not believe the Appellant used the vehicle in question without consent.

2. The trial judge's instruction regarding flight by the Appellant standing alone affects Appellant's substantial rights within the meaning of Rule 52(b) Fed. R. Crim. P. For although the instruction did not explicitly state that flight created a presumption of guilt, the use of the qualifying phrase "of itself" within the context of the instruction served to effectively confuse the jury regarding the legal significance of flight.

3. The trial judge's instruction regarding what he stated was the "key issue in the case..." (Tr. 80) was confusing and prejudicial to Appellant so as to affect Appellant's substantial rights within the meaning of Rule 52(b) Fed. R. Crim. P.

ARGUMENT

I.

The Trial Judge Erred In Not Instructing The Jury That A Two Step Process Was Required Before It Could Find The Appellant Guilty Of Unauthorized Use Of A Motor Vehicle The Trial Judge's Instruction Regarding Flight Failed To Point Out Under What Circumstances Appellant's flight Could Be Considered

The statute which Appellant was convicted of violating states as follows:

> "Any person who, without the consent of the owner, shall take, use, operate or remove, or cause to be taken, used, operated or removed from a garage, stable or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, enclosure, or place, an automobile or motor vehicle and operate or drive or cause the same to be operated or driven for his own profit, use or purpose, shall be punished as provided by law." (22 D.C.C. 2204)

It requires no sophisticated logical analysis to recognize that for the jury to have found Appellant guilty of violating this statute, it was required to proceed through two independent analytical steps. First, the jury must have found whether or not

Appellant had Harper's permission to use his car. Only if the jury resolved this question against Appellant could it reach the second step, namely whether the Appellant used Harper's car. It is respectfully submitted that a fair reading of the instructions set forth in the transcript at pages 70-73 from the vantage point of a member of a jury demonstrates the trial judge never instructed the jury clearly regarding these vital matters. The trial judge read the statute to the jury which he twice stated was "...a very broad statute..." He said he would explain it in "greater detail in a few moments" and then he never did. The facts before the Court bear a striking similarity to those in Miller vs. United States, 320 F 2d 767, 116 U.S. App. D.C. 45 (1963), where this Court reversed a robbery decision because of errors in the jury's instructions which were not asserted at the trial. This Court pointed out:

> "The jury therefore had two principal tasks to perform. It had to pass on the truth of the complaining witness' uncontroverted testimony... If it believed this testimony, the jury then had to decide whether these circumstances warranted an inference that the wallet was stolen rather than dropped accidentally.
>
> No instruction outlining this two step process was requested or given."

The Court concluded that the trial judge's failure to outline the two step procedure conveyed "...an erroneous impression" to the jury regarding the government's case, and it was concluded that this and related errors constituted "plain error effecting substantial rights..." within the meaning of Rule 52(b) Fed. R. Crim. P. Similarly, in this appeal the same result should obtain for the trial

judge gave the jury an erroneous impression by his failure to explain that only if the jury believed Harper's testimony regarding whether the Appellant had consent to use his car, should the jury consider whether the Appellant in fact did use the car. The vice of this failure is made apparent by examining the trial judge's instruction regarding flight. He stated:

> "Now, flight by a defendant after a crime has been committed does not of itself create a presumption of guilt. However, you may consider evidence of flight as tending to prove the defendant's consciousness of guilt. You are not required to do so, however.
>
> You should consider and weigh the evidence of flight by the defendant in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive." (Emphasis Supplied) (Tr. 73)

He failed to explain to the jury that they should not consider at all Appellant's flight if they did not believe Harper's testimony. It is respectfully submitted that without this admonition, the jury would naturally and reasonably give significant consideration to police officer Monaco's testimony regarding Appellant's flight. The trial judge's instruction on this matter makes it clear the jury could easily and probably did give improper consideration to Appellant's flight.

This error, it is respectfully submitted, affected Appellant's substantial rights within the meaning of Rule 52(b) Fed. R. Crim. P.

because "...the reviewing Court can [not] say with fair assurance that the judgement of the jury was not swayed by the error". Blackwell v. United States, 244 F 2d 423, 431 (C.A. 8, 1957); Cert. denied 355 U.S. 838.

II.

The Trial Judge's Instruction Regarding Flight Was Error As A Matter Of Law

This Court in Miller vs. United States, supra, set forth clear guidelines concerning instructions regarding flight. The Court stated at 320 F 2d 773:

> "When evidence of flight has been introduced into a case..., the trial court should, if requested, explain to the jury, in appropriate language, that flight does not necessarily reflect feelings of guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. This explanation may help the jury to understand and follow the instruction which should then be given; that they may, but need not, consider flight as one circumstance tending to show feelings of guilt; and that they may, but need not, consider feelings of guilt as evidence tending to show actual guilt."

It is respectfully submitted that the tenor of the instruction regarding flight was basically inconsistent with the above rationale.

The whole thrust of this Court's concern in Miller, supra, was to admonish trial judges in instructing the jury to refrain from presuming guilt from flight. The language quoted above in Miller goes to great pains to make this very point. While the trial judge's instruction in the instant appeal did not explicitly permit the presumption

of guilt from flight, the use of the words "of itself" in the instructions to the jury, it is submitted, could serve no purpose other than to confuse them regarding the significance of flight. For these words are superfluous to the sentence. They add nothing to the meaning of the sentence. The words do nothing but confuse. This confusion, it is believed, could easily have resulted in the jury arriving at precisely the presumption that would be error as a matter of law, namely that flight is a presumption of guilt.

The vice of this instruction is emphasized by the trial judge's failure to explain that the jury should not consider at all Appellant's flight if it did not believe Harper's testimony. (See Point 1 of this brief.)

It is respectfully submitted that this error alone affected Appellant's substantial rights within the meaning of Rule 52(b) Fed. R. Crim. P., c.f. Herzog vs. United States, 222 F. 2d 561 (C.A. 9, 1965); Cert. denied 352 U.S. 844.

III.

The Trial Judge's Instructions Regarding What He Stated To Be "The Key Issue In The Case" Was Confusing

The trial judge instructed the jury as follows regarding "...the key issue in the case..."

"The purpose of the trial, and the only purpose, is to ascertain the truth regarding the issues in the case and in this case the issue is: 'What happened in connection with this automobile which was removed?' 'Did the defendant have the permission of the owner, as one of the witnesses apparently claimed he did understand, or did he remove it without the owner's permission being granted to him?' 'Did he have the right to take it and use it?' "

"That is the key issue in the case and if he did, if he did it knowingly, willfully, intentionally, remove it and operate it and drive it without the permission of the owner and the Government has proved all the other elements that I gave to you regarding the definition of this offense, beyond a reasonable doubt, then, of course, he would be guilty." (Emphasis Supplied) (Tr. 80.)

A fair reading of the sentence commencing "Did the defendant" establishes it simply is not comprehensible. It is impossible to ascertain whether the "he" referred to Appellant or the witness. This is critical in view of the importance given this instruction by the trial judge. Furthermore, the word "understand" renders the entire sentence meaningless, for it makes no sense within the context of the sentence. Finally, assuming, which is reasonable under the circumstances, that the jury tried to give meaning to the instruction, it is impossible to determine whether the jury believed the trial judge was referring to the understanding of the Appellant or was he referring to the witness' understanding.

There can be no dispute that this was an extraordinarily confusing instruction regarding a vital element of proof before the jury. Indeed, it need be emphasized that this confusing instruction

concerned what the trial judge told the jury was the "...key issue in the case..."

This Court's statement in Colbert vs. United States, 142 F 2d 10, 12 79 U.S. App. D.C. 261 (1944) is apposite:

> "Where the judge elects to charge in his own language on all matters properly to be considered by the jury, the failure of a requested instruction to conform precisely to the law, should not relieve the Court of the duty to charge accurately upon an important phase of the evidence. Much more is this true where, as here, the Court announces its purpose to do so." (Emphasis Supplied)

Certainly there can be no dispute that the trial judge elected to charge in his own language regarding what he stated to be "...the key issue in the case..." Clearly then he assumed the responsibility to "charge accurately upon an important phase of the evidence". It is apparent his instruction was hopelessly confusing. Thus, it is respectfully submitted the instruction constituted "plain error" affecting the substantial rights of Appellant within the meaning of Rule 52(b) Fed. R. Crim. P.

CONCLUSION

For the foregoing reasons the judgment appealed from must be reversed.

Respectfully submitted,

ROBERT M. JOHNSON

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His Attorney
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March 15, 1968

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,441

ROBERT M. JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 16 1968

Nathan J. Paulson
CLERK

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Cr. 835-66

QUESTION PRESENTED

In the opinion of the appellee the following question is presented:

In a case where both prosecution and defense witnesses testified that appellant had possession of the car and the only issue was whether he had permission to drive the car, and where trial counsel for appellant expressed satisfaction with the charge, were various aspects of that charge relating to the elements of the offense, flight, and the statement of the key issue in the case plainly erroneous, affecting appellant's substantial rights?

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Appeal from the United States District Court for the District of Columbia

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BRIEF AND APPENDIX FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on June 28, 1966 appellant was charged with unauthorized use of a vehicle (22 D.C. Code § 2204). Trial was held before Judge John J. Sirica and a jury on August 22 and 23, 1967. The appellant was found guilty and on October 6, 1967 sentenced to a term of twenty months to five years.

The Government called three witnesses: the arresting officer, Peter S. Monaco, the complaining witness, Nelson E. Harper, and the corroborating eyewitness to the defendant's driving of the automobile, Mickey Richardson.

Harper testified that he had gone to visit with a lady by the name of Willie Mae Monroe on the date of May 25, 1966. He drove his automobile to the 1700 block of T Street, N.W., and parked it in front of the house of his sister, who lived across the street from Mrs. Monroe (Tr. 12-13).

Having fixed some venetian blinds for Mrs. Monroe, Harper accepted a drink of gin from her, after which he did not recall anything until around 4:00 a.m. the following morning (Tr. 13-14, 31). He stated that at the time he took the drink he and Mrs. Monroe were the only people present at her place (Tr. 14, 32). When he awoke at four o'clock, the only other people present were two men whom he characterized as being drunk (Tr. 14). At this time he discovered that his pants pockets had been torn, and that his wallet and the keys to his car missing. Upon going out to the street, he was unable to locate his car (Tr. 14, 26).

He stated that he returned to Mrs. Monroe's house a few hours later, but that she was too drunk at that time for him to understand her conversation (Tr. 15, 35-36). He worked as a truck driver, but because his driver's license was in the wallet which had been taken, he worked as a helper on a truck driven by Mickey Richardson. (Tr. 16.) Around 3 o'clock that same afternoon, he and Richardson were in the vicinity of 9th and P Streets, N.W., when he spotted his car, being driven by appellant (Tr. 16-17). Richardson followed the car in the truck, and when the opportunity presented itself, Harper called the nearest precinct (Tr. 17).

Detective Monaco was cruising in this area around this time, and recognized the car as one reported stolen from a police radio dispatch (Tr. 4-5). Monaco was subsequently hailed by Harper and Richardson, and gave chase to the car, which was abandoned in heavy traffic while it was still moving. The empty car left the street, going over the crub, and came to rest after crashing into a tree. (Tr. 5, 19-20.) All three witnesses testified that there were three men who jumped out of the moving ve-

hicle, and all three positively identified appellant as having been the driver (Tr. 4-6, 18, 40-41). After a brief time, appellant was apprehended. He was searched in the presence of Harper, and was found to have on his person Harper's wallet and personal papers, including the registration to the same automobile (Tr. 7-9, 20-21, 27).

Harper testified that he did not give appellant his wallet or permission to drive his automobile. He denied having seen appellant at Mrs. Monroe's on the previous evening (Tr. 28-29, 32).

The only witness called by the defense was Willie Mae Monroe, who agreed that Mr. Harper had been at her house on the night of May 25, 1966. She testified that several people were there and that Mr. Harper had brought a friend with him. She testified that at one point, in order to be alone with her, Harper falsely claimed to be in no condition to drive and thus gave appellant his car keys and wallet so that appellant could drive Harper's friend home. Appellant was to return the car afterwards, according to Mrs. Monroe, and was given the wallet in the event any trouble arose. (Tr. 43-45, 59).

Later in the evening, Mrs. Monroe said, Mr. Harper left to purchase some whiskey. When he returned, he claimed to have been robbed of his wallet and keys and said that his pants had been torn. (Tr. 46-47, 52-55.) At about one o'clock in the morning, when Harper began making unwanted advances to her, Mrs. Monroe allegedly ordered him out (Tr. 47-48). Although she agreed that he had returned at about eight o'clock that morning, she said she had told him she did not want to talk with him any more and that he did not mention his car being missing (Tr. 48). Mrs. Monroe did not recall whether appellant ever returned with Mr. Harper's car (Tr. 53). The only other time she acknowledged having seen Harper was about a week thereafter when Harper promised to make things easier for her and her children if she would not testify for appellant in connection with the car (Tr. 48-49). On cross examination she could not ex-

plain just what testimony it was that Harper was asking her not to give (Tr. 57).

RULES AND STATUTE INVOLVED

Rule 30, Federal Rules of Criminal Procedure, provides in part:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. . . ."

Rule 52(b), Federal Rules of Criminal Procedures, provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Title 22, District of Columbia Code, Section 2204, provides:

> "Any person who, without the consent of the owner shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or dirven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment.

SUMMARY OF ARGUMENT

Both prosecution and defense witness testified that appellant had custody of the complainant's car; they differed only on the question of whether appellant had per-

mission to drive the car. In summation defense counsel pointed out that there was no issue as to whether appellant had been the driver of the car and that the only matter for the jurors to consider was whether he had had the owner's consent. The trial was neither prolonged nor complex. With the case in this posture, the court's instructions on the elements of the offense and flight were sufficient and not confusing, and the court's statement of the key issue for the jury's consideration was clear and correct.

Most importantly, appellant's trial counsel saw no difficulty with the charge and indeed expressed satisfaction with it. Accordingly, he can not at this stage urge as plain and substantial error matters which could easily have been clarified at trial and which did not appear confusing to counsel immersed in the trial situation.

ARGUMENT

I. The instructions of the trial court were proper.

(Tr. 5-6, 18, 40-41, 44-45, 67, 70-71, 72-74, 80-81)

Appellant suggests three or four aspects in which he claims the trial court erroneously instructed the jury. At trial, there was no objection to the charge as given, and indeed counsel expressed satisfaction with the charge as a whole (Tr. 81). Accordingly, appellant now bears an exceedingly heavy burden in attempting to demonstrate that the charge contained plain error affecting substantial rights. *E.g.*, Fed. R. Crim. P. 30, 52(b); *Manning* v. *United States*, 125 U.S. App. D.C. 256, 371 F.2d 353 (1966); *Pitts* v. *United States*, 99 U.S. App. D.C. 63, 237 F.2d 217 (1956); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950). A review of the trial transcript reveals that appellant can not meet that burden.

The first complaint with the charge asserts that the trial court erroneously failed to instruct the jury to consider the evidence in two steps: to first determine whether

or not appellant had permission to drive the car, and to reach the question of whether appellant in fact had possession of the car only if it found he had permission to drive it. Logically, however, the questions should be considered in the reverse order, for if the defendant did not possess the car then there would be no need to reach the question of consent.

In the instant case, there was no dispute that the appellant was driving the complainant's automobile—so three Government witnesses testified (Tr. 5-6, 18, 40-41), and so in essence did the defendant's own witness (Tr. 44-45). Moreover, in summation defense counsel conceded that his client had been driving Mr. Harper's car:

> You have to find whether this defendant was given permission to use that car or whether he took the keys and was guilty of unauthorized use (Tr. 67).

With the case in this posture, it is apparent that the trial court's instructions on the elements of the offense were sufficient.[1] First the court read to the jury the statute defining the offense of unauthorized use (22 D.C. Code § 2204) and pointed out that an intent to steal was not an element of that crime (Tr. 70-71). Then the court read the indictment and defined the essential elements of unauthorized use. Several times the court stated that in order to convict the jury must find that the defendant used the car and that he used it without the consent of the owner (Tr. 72-74, 80). That is the essence of the crime charged. In view of the issue as presented by the appellant, no more complex instructions were necessary. *Cf. Smith* v. *United States*, 118 U.S. App. D.C. 38, 331 F.2d 784 (1964) (*en banc*); *United States* v. *Monticallos*, 349 F.2d 80 (2d Cir. 1965).

Appellant's exclusive reliance on *Miller* v. *United States*, 116 U.S. App. D.C. 45, 320 F.2d 767 (1963) is misplaced. Tho "two steps" involved in that robbery case were whether the Government's testimony should be be-

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[1] This portion of the charge is set forth in the appendix to this brief.

lieved and whether that testimony, if believed, supported an inference of robbery rather than of larceny. From the three separate opinions in that case, it appears that the reversal was based not on the failure of the court to delineate the two-step process, but rather on the erroneous implication in the charge that if the jury believed the government witness on the first step, it could then infer guilt without consideration of step two. The case is plainly inapposite.

Appellant next attacks the instruction on flight, arguing first (Brief at 9) that the jury should have been instructed to consider the inferences flowing from flight only if it found appellant was driving the car without the consent of the owner. However, once the jury reached the conclusion that appellant was driving the car without the consent of the owner, it could convict, and there would be no need to consider the evidence of flight at all. The relevance of flight, in the context of this case, was as evidence indicating consciousness of guilty possession and thus as some evidence supporting Mr. Harper's testimony that appellant did not have permission to drive the car. Appellant's argument is logically unsound.

Appellant also complains that the words "by itself" in the first sentence of the court's charge on flight must have confused the jury into erroneously believing that flight created a presumption of guilt. This suggestion is without merit. The court's charge on flight [2] emphasized that the jury need not consider flight as indicating consciousness of guilt and did state that flight does not create a presumption of guilt. The offending words apparently made no impression on experienced trial counsel and could not, we submit, have led the jury into error. Indeed, in

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[2] "Now, flight by a defendant after a crime has been committed does not of itself create a presumption of guilt. However, you may consider evidence of flight as tending to prove the defendant's consciousness of guilt. You are not required to do so, however.

You should consider and weigh the evidence of flight by the defendant in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to received." (Tr. 73.)

Wright v. *United States*, 116 U.S. App. D.C. 60, 320 F.2d 782 (1963), a panel of this Court (Chief Judge Bazelon, Senior Circuit Judge Edgerton, and Circuit Judge Wright) refused to reverse a conviction where the trial court had, without objection, charged that flight "creates a presumption of guilt." *A fortiorari* there was no plain error affecting substantial rights in the instant case. *Cf. Robertson* v. *United States*, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966).

Finally, appellant asserts that the portion of the charge focusing the jury's attention on the primary issue presented was confusing. However, it is apparently unquestioned that the important issue for the jury was whether or not the defendant had permission to drive the car. Accordingly, the court properly stated that the "key issue" was ' "Did the defendant have the permission of the owner, as one of the witnesses apparently claimed he did understand, or did he remove it without the owner's permission being granted to him?" "Did he have the right to take it and use it?" ' (Tr. 80.) Since the witness who testified that the defendant had permission to drive the car was the defendant's own witness, a woman, the "he" referred to was obviously the defendant. The absence of objection again indicates that no error was apparent to counsel who tried the case and heard the charge given, and that the jury was not confused by the charge. *Cf. Robertson* v. *United States, supra.*

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
THEODORE WIESEMAN,
JOHN J. MCKENNA,
Assistant United States Attorneys.

APPENDIX

"Now, flight by a defendant after a crime has been committed does not of itself create a presumption of guilt. However, you may consider evidence of flight as tending to prove the defendant's consciousness of guilt. You are not required to do so, however."

"You should consider and weigh the evidence of flight by the defendant in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to received."

"If you find that the Government has proved beyond a reasonable doubt that the defendant was in exclusive possession of a motor vehicle in the District of Columbia on or about the date alleged in the indictment, and that the vehicle had recently been taken and removed without the permission of the owner, and that the defendant's possession of the vehicle on the date in question and under the circumstances in question has not been satisfactorily explained, then you may, if you see fit to do so, infer therefrom that the defendant is guilty of the offense of using the automobile without the permission of the owner. You are not required so to infer, but you may do so if you deem it appropriate. . . ."

". . . The purpose of the trial, and the only purpose, is to ascertain the truth regarding the issues in the case and in this case the issue is: 'What happened in connection with this automobile which was removed?' 'Did the defendant have the permission of the owner, as one of the witnesses apparently claimed he did understand, or did he remove it without the owner's permission being granted to him?' 'Did he have the right to take it and use it?'

"That is the key issue in the case and if he did, if he did it knowingly, wilfully, intentionally, remove it and operate it and drive it without the permission of the owner and the Government has proved all the other elements that

I gave to you regarding the definition of this offense, beyond a reasonable doubt, then, of course, he would be guilty."

"If you have a reasonable doubt as to the defendant's guilt, of course, you would acquit." (Tr. 70-73, 74, 80.)

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